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STATE OF WASHINGTON  
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BY RONALD R. CARPENTER  
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June 19, 2007

Ronald R. Carpenter  
Supreme Court Clerk  
Temple of Justice  
P. O. Box 40929  
Olympia WA 98504-0929

Re: Comment on Proposed Amendment to Rule 1.15(A)(e) of the Rules of Professional Conduct

Dear Mr. Carpenter:

This letter comments on the proposal published in the April 24, 2007 issue of Washington Reports Advance Sheets to amend existing Rule 1.15(A)(e) of the Rules of Professional Conduct. I urge the Court to reject the proposed amendment, which would remove an important client protection, as contrary to the public interest.<sup>1</sup>

### The Proposed Amendment

The proposed amendment would change existing RPC 1.15A(e) as follows (a strike-through indicates a proposed deletion, an underlining indicates a proposed addition):

#### Rule 1.15A: Safeguarding Property

(a) – (d) [Unchanged]

(e) A lawyer must promptly provide a written accounting to a client or third person after distribution of property or upon request. A lawyer must provide at least annually a written accounting to a client or third person for whom the lawyer is holding property funds.

(f) – (j) [Unchanged]

The April 2007 notice of the proposed rule change recites, in its "Purpose" section, that

the annual accounting requirement is overbroad and unduly burdensome. . . . The benefits of periodically providing such information to clients are outweighed by the burdens involved in compliance. By limiting the requirement to "funds," the rule will exclude nonmonetary property from the annual reporting obligation, but the general obligation to safeguard all client property in the lawyer's possession will not be affected.

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<sup>1</sup> My comments are my own and should not be viewed as those of any other person or organization with which I have been associated. I currently maintain my own law practice. Formerly I served as the initial reporter to the Special Committee for the Evaluation of the Rules of Professional Conduct which drafted the rule now proposed to be amended. I also formerly served as the Director of Lawyer Discipline/Chief Disciplinary Counsel and as the Professionalism Counsel of the Washington State Bar Association.

Substantially all of the comment letters on the proposal included on the Court's website also recite that the existing annual accounting requirement is unduly burdensome to the lawyer and state or suggest that if the current rule is not amended, they will no longer hold client property or original client documents. I disagree with such comments.

### **Comment**

While the proposed amendment is minor in form – it merely substitutes the word “funds” for the rule’s final word “property” – it would have important negative consequences to clients and to the public.

Comment [3] to existing RPC 1.15A states that the rule applies to property held by the lawyer in any fiduciary capacity, while Comment [5] states that “Property covered by this Rule includes original documents affecting legal rights such as wills or deeds.” Thus the rule applies to all client property held by the lawyer in any fiduciary capacity. It is a well-established principle of law that lawyers are fiduciaries with respect to their clients and that they are held to the highest standard of care towards their clients and towards any property of their clients held by the lawyer. While the pending proposal would not affect, as recognized by the “Purpose” section stated above, the lawyer’s obligation to safeguard all client property in the possession of the lawyer, it would remove a very important safeguard to the client, namely, the lawyer’s obligation to report annually to the client that the lawyer continues to hold the property as a fiduciary for the client.

In most client representations lawyers have little or no legal need to retain client property. In the case of client documents, in most cases the lawyer’s need for the document can be satisfied by making a copy of the document and returning the original to the client. When a lawyer receives client property, including an original document, good office practice calls for the lawyer to provide the client with a written acknowledgment of receipt of the named property or of the named original document. This acknowledgment protects the lawyer from future claims by the client or others that the client delivered other property or original documents to the lawyer which have subsequently been lost or misplaced. It also protects the client by having clear evidence that the lawyer, not the client, has the named property or the original of the document. Similarly, when the lawyer returns property or an original document to the client, good office practice calls for the lawyer to either secure a written acknowledgment of receipt by the client, or at least to maintain in the lawyer’s file a copy of the transmittal letter transmitting the named property or original document(s) to the client.

Despite having little or no legal need to retain client property, including original documents, lawyers with some frequency do retain such property. They do so both for the convenience of their clients, who perhaps would lose or misplace them, and for their own convenience. For example, lawyers have long had the practice of retaining in their files original documents relating to wills, trusts and estates as a marketing tool. They have a strong financial interest in doing so. If the lawyer retains the original of those documents, the lawyer is far more likely to be retained in the future when it comes time to probate or otherwise settle the estate or to administer the trust. Thus, both clients and lawyers may have good reasons for a lawyer to retain client property, including original client documents.

If the lawyer is to retain client property, including original client documents, the lawyer as a fiduciary should be held accountable for doing so. It is neither unreasonable nor unduly burdensome for a lawyer to provide a client an annual accounting of the client property, including original documents, that the lawyer holds on behalf of the client. If the lawyer has maintained good office practices, the lawyer will already

have provided the client with an acknowledgment of receipt of the property. All that is required of the lawyer thereafter is that the lawyer, once a year, inventory the client property held and report that property to the client. Little more is needed than a routine form-letter to the client confirming that the lawyer still holds the property for the client. This is essentially clerical work for which there would be little cost. Such a letter could also easily serve as a marketing letter for the lawyer to remind the client that the lawyer stands ready to serve the client on matters related to the named property or on any other matters. If the lawyer is concerned about the cost to the lawyer for annually reporting on retained client property, the lawyer can return the property to the client. Or, the lawyer can do what the lawyer does with substantially every other cost the lawyer incurs in representing the client – pass the cost onto the client by billing the client a modest annual property-retention fee. Of course, many lawyers would absorb such costs as marketing or client-relationship costs leading to their future engagement for legal services.

If the lawyer is not required to provide an annual accounting to the client for property held by the lawyer, the client has no assurance that the lawyer has not lost or misplaced, or misfiled, the client property, or that the lawyer will not thereafter deny ever having received the property. Thus, the client might not know for years, even decades, that property entrusted to the lawyer is no longer held by the lawyer. This could be devastating to the client. The client and the public deserve better. The client deserves to know, at least annually, that the lawyer still retains the client property entrusted to the lawyer. If the lawyer no longer has possession of that property, the client deserves to know that fact on a current basis so that the client can still take steps to protect the client's interests.

### **Conclusion**

The proposed revision to RPC 1.15A(e) should be rejected. It serves the interest of lawyers and does not protect the interests of either clients or the public. I urge the Court to look out for the public's interest by rejecting the proposed amendment to existing RPC 1.15A(e).

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Barrie Althoff".

Barrie Althoff